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Supreme Court of the United States

October Term, 1940.

No. 117

HENRY PIRTLE,
Petitioner,

vs.

H. B. BROWN, CHRISTIAN KOPP, and W. F. WARREN, individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity,

Respondents.

REPLY OF ROY H. BEELER, ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSEE, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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BAIRD-WARD—NASHVILLE

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May It Please the Court:

STATEMENT OF THE CASE.

This suit originated in the District Court of the United States for the Middles District of Tennessee by the filing of a petition by the petitioner, Henry Pirtle, under the Federal Declaratory Judgments statutes, against three individuals named as Judges of Election in a special election

held to fill a vacancy occasioned by the death of a member of the House of Representatives. The petition averred that the petitioner possessed all qualifications required by state law to vote in such election save that he had not paid his poll tax for the preceding year as required by the Constitution and statutes of Tennessee, and further averred that since the election was to be held solely for the purpose of filling a vacancy in the House of Representatives, the constitutional provisions and statutes of Tennessee thereby had the effect of levying a tax upon the exercise of a Federal right by the petitioner and for this reason were invalid and that the petitioner was entitled to vote in such election despite the non-payment of such poll tax for the preceding year. The petition prayed for a declaration at the hands of the Court to the effect that such statutes were invalid and that the petitioner was entitled to vote in such election despite his non-payment of such tax.

The individuals named as Judges of Election being only nominal parties without real interest in the controversy, the Attorney General and Reporter of the State of Tennessee, in his official capacity, was permitted to intervene and file pleadings, maintaining the validity of such statutes against the contentions presented by the petitioner.

Upon the hearing in the District Court, it was adjudged that the petitioner was not entitled to the relief sought by his petition and a declaration to that effect was entered. An appeal was duly prayed, granted and perfected to the United States Circuit Court of Appeals for the Sixth Circuit, which Court affirmed the decree of the lower court on March 8, 1941. The opinion of the Circuit Court of Appeals is reported in 118 Fed. (2d), 218, and is found on pages 28-32 inclusive of the transcript of the record.

QUESTION.

The question presented by the petition for certiorari is whether or not the constitutional provisions and statutes of Tennessee levying a non-discriminatory poll tax, not to exceed $2.00 annually, upon all *inhabitants* between the ages of 21 and 50 years, and making its prepayment a condition precedent to voting in *any* election, violates the Constitution of the United States when applied to an election held for the purpose of electing a member of the House of Representatives.

Stated differently, the present case concerns, not the constitutional right of the qualified elector to cast his vote for federal officers, but the right of the state to prescribe qualifications for voters for the most numerous branch of its own legislature which automatically become the qualifications of one desiring to vote for members of the House of Representatives.

JURISDICTION.

Jurisdiction of the Federal Courts is conceded by this respondent.

POINTS OF LAW.

1.

Since the federal question sought to be made by petitioner has been decided adversely to his contention by two decisions of this Court, the petition should be denied as presenting no substantial federal question.

Breedlove v. *Suttles*, 302 U. S., 271;
Pope v. *Williams*, 193 U. S., 632.

II.

Where a statute be susceptible of two constructions, that construction should be placed on it which avoids doubt as to the constitutionality of such statute.

Bratton v. *Chandler*, 260 U. S., 110, 114;
U. S. v. *Jin Fuey Moy*, 241 U. S., 394, 401.

III.

The poll tax in Tennessee is a revenue measure with incidental disqualification for failure to pay, rather than a tax on the privilege of voting.

Const. of Tenn. (1870), Art. II, Sec. 28;
Const. of Tenn. (1870), Art. IV, Sec. 1;
Const. of Tenn. (1870), Art. XI, Sec. 12;
Code of Tenn. (1932), Sec. 1082;
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Code of Tenn. (1932), Sec. 2027;
Code of Tenn. (1932), Sec. 2030;
Breedlove v. *Suttles*, 302 U. S., 277;
Whittaker v. *Watson*, 68 Ark., 555; 60 S. W., 651;
Opinion of Justices, 11 Pick. (Mass.), 538.

IV.

The right to universal suffrage is not conferred by the Constitution of the United States or any amendment thereto.

Breedlove v. *Suttles*, 302 U. S., 277;
Guinn v. *U. S.*, 238 U. S., 362;
Minor v. *Happersett*, 21 Wall., 162.

V.

On the contrary, Article I, section 2, of the Constitution of the United States reserves to the several states the right to determine who shall constitute the electors of the most numerous branch of the state legislature and then such qualifications are adopted by the Constitution of the United Stated as those of the electors for members of the House of Representatives.

Breedlove v. *Suttles*, 302 U. S., 277;
Ex Parte Yarbrough, 110 U. S., 651.

VI.

While the right to vote for members of the House of Representatives is a right having its origin in the Constitution of the United States, such right must be exercised in conformity with the state laws both as to qualifications and as to method of voting in the absence of congressional legislation upon the subject.

U. S. v. *Classic, et al*, 313 U. S., ..., Opinion May 26, 1941.

VII.

A property qualification or the prepayment of poll tax as a condition precedent to the exercise of the elective franchise does not violate the Constitution of the United States.

Breedlove v. *Suttles*, 302 U. S., 277;
Myers v. *Anderson*, 238 U. S., 368;
Pope v. *Williams*, 193 U. S., 632;
U. S. v. *Reese*, 92 U. S., 214;
Minor v. *Happersett*, 21 Wall., 162;
Frieszleben v. *Shallcross*, 9 Houston (Del.), 1;

State, ex rel. v. *Dillon,* 32 Fla., 545;
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Buckner v *Gordon,* 81 Ky., 665;
Patterson v. *Barlow,* 60 Pa. St., 54.

VIII.

Indirect taxation of federal rights or federal instrumentalities by a non-discriminatory tax does not conflict with the Constitution of the United States.

Tradesmen National Bank v. *Okla. Tax. Com.,* 309 U. S., 560;
Graves v. *N. Y.,* 306 U. S., 465;
James v. *Dravo Const. Co.,* 302 U. S., 134;
Fox Film Co. v. *Doyal,* 286 U. S., 123;
Pacific Co. v. *Johnson,* 285 U. S., 480;
Educational Film Co. v. *Ward,* 282 U. S., 379.

ARGUMENT.

I.

THE GROUNDS RELIED UPON AS JUSTIFYING THE GRANTING OF THE PETITION HAVE BEEN DECIDED ADVERSELY TO THE CONTENTION OF THE PETITIONER.

The petition gives as the reasons relied upon for the allowance of the writ four grounds, all of which go to the same point, to-wit, that no state may constitutionally impose as a condition precedent to the casting of a vote for a member of Congress the prepayment of a poll tax. This exact question was decided against the contention of the petitioner in the case of *Breedlove* v. *Suttles*, 302 U. S., 277, 82 L. Ed., 252. It is argued upon behalf of the petitioner that the Court in determining the case of *Breedlove* v. *Suttles, supra.*, was misled by the fact that state officials were to be voted for at the same election and that this constituted the determining factor in the decision of the Court. Such contention proceeds from a misconception of the opinion. As stated in the opinion, under the Georgia statutes, payment of a poll tax was a condition precedent to entitle any person to register and vote at any election, Federal or state. Thusly, the question of the right to vote in Federal elections was directly involved in this case. That this is true appears from the annotation following this case in 82 L. Ed, 257, 258. Likewise, from such annotation it distinctly appears that the appellant urged the Court to reconsider the constitutional power to condition the right to vote upon the payment of a tax.

In *Pope* v. *Williams*, 193 U. S., 621, 632-633, in determining that the qualifications which might be imposed by

a state lay within the discretion of that state except so far as such might be restrained by the provisions of the Federal Constitution, this Court said:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall., 162. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor* v. *Happersett, supra,* such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. *A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the states alone to prescribe,* subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Federal Constitution,

Art. 1, sec. 2; *Wiley* v. *Sinkler*, 179 U. S., 58. *But the elector must be one entitled to vote under the state statute.* (Id., Id.) See also *Swafford* v. *Templeton*, 185 U. S., 487, 491. In this case no question arises as to the right to vote for electors of President and Vice President and no decision is made thereon. *The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one.*" (Italics ours)

We respectfully insist that these two opinions of this Court definitely foreclose against the petitioner the alleged conflict of the challenged statutes with the Federal Constitution, and for that reason, the Federal question sought to be presented by him is without substance and the petition should be denied.

II.

STATUTES SHOULD BE CONSTRUED SO AS TO AVOID DOUBTS AS TO THEIR CONSTITUTIONALITY.

We take it that the foregoing rule of statutory construction is perhaps as universal as any rule of law prevailing in the United States. It is so universal that this respondent respectfully insists that merely a reference to the two cases above set forth as sustaining such proposition will suffice to establish it. These cases are *Bratton* v. *Chandler*, 260 U. S., 110, 114; and *U. S.* v. *Jin Fuey Moy*, 241 U. S., 294, 401. Numerous other cases might be cited to the same effect.

III.

THE POLL TAX LEVIED BY THE STATE OF TENNESSEE IS A REVENUE MEASURE WITH INCIDENTAL DISQUALIFICATION FOR FAILURE TO PAY, RATHER THAN A TAX ON THE PRIVILEGE OF VOTING.

In considering this question obviously, the nature of such poll tax must be investigated. In Tennessee poll taxes were authorized by the Constitution of 1834 (Article II, Sec. 28). At that time prepayment was not a condition precedent to voting. Pursuant to this grant of power, polls were levied at the rate of 25c (Code of 1858, Sec. 553).

The Constitution of 1870 made a rather decided change in the levy of poll taxes in Tennessee. By Article II, Sec. 28, Constitution of 1870, it was provided:

> "All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Likewise, Article IV, Sec. 1, of this same document made for the first time prepayment a condition precedent to the exercise of the electoral franchise in the following language:

> "Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county where-

in he may offer his vote for six months next preceding the day of election ,shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of the election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe and at such time as may be prescribed by law, without which his vote can not be received."

Likewise, Article XI, Sec. 12 of this Constitution irrevocably dedicated the State revenues received from poll taxes to educational purposes.

Pursuant to this grant of power, the Legislature (Code of Tennessee 1932, Sec. 1082), levied a poll tax on behalf of the State in the sum of $1.00 against all persons between the ages of 21 and 50 years of age, the age of such person as of January 10 constituting the test of liability. By the following section of the Code (1083), the several county courts of the State were authorized to exempt persons physically unable to labor from the payment of this tax.

By Section 2027 of the Code payment of poll tax for the preceding year was required to be made sixty days prior to the date on which any election shall be held to enable the person so paying such poll tax to vote therein. By Section 2030 of the Code, it is provided that a duly authenticated list of all persons paying their poll tax more than sixty days prior to the date of any regular election shall be made by the County Trustee (the collecting officer) and

that one copy thereof shall be furnished to the Chairman of the Board of Election Commissioners (who conduct elections) and another to the Secretary of State.

As showing the solicitude with which the Legislature viewed efforts to collect this poll tax, the statute (Code Section 1559) forbids any tax collecting officers to receive the property taxes of any person liable for poll tax unless such poll tax is paid at the same time such property taxes are paid.

As the Court has no doubt already discovered, the argument on behalf of the appellant is to the effect that the poll tax is a tax upon the privilege of exercising the electoral franchise and that since the right to vote for members of Congress and electors for President and Vice-President is conferred by the Federal Constitution, such constitutes an effort on the part of the states to tax a Federal privilege or right and, therefore, can not be sustained.

Obviously, if the tax in question is not a tax upon the right to vote, but on the contrary, merely a revenue measure, the argument falls flat and we shall undertake to demonstrate that it constitutes a revenue measure rather than a tax upon the exercise of the electoral franchise.

The following points seem to the respondent to require the construction contended for by us in construing this statute:

(1) Neither the Tennessee constitutional provision nor the statutes enacted pursuant thereto purport by their terms to levy a tax either upon the privilege of voting or upon the voters as a class.

(2) A contrary intent may be inferred from the exclusion of a vast body of qualified voters from liability for this tax.

(3) The party against whom this tax is properly levied remains liable for the payment thereof whether or not such party exercises the electoral franchise.

(4) Aliens, persons deprived of citizenship by reason of conviction of infamous crimes, persons who may not be qualified to vote from lack of residential qualifications. and others who do not possess the right to vote are liable for such tax.

(5) No additional payment of tax is required for the exercise of the privilege of voting for members of the House of Representatives.

(6) The constitutional provisions levying this tax are found in that portion of the Constitution of Tennessee dealing with taxation, while the disqualification provisions are found in that section of the Constitution dealing with elections. The same is true of the Tennessee statutes.

Briefly discussing the foregoing points, it is obvious from a reading of the Tennessee statutes that they do not by express terms undertake to levy a tax upon either the privilege of voting or upon voters as a class for the statute in question levies a tax upon all *inhabitants* between specified ages. The use of the word "inhabitants" is significant and denotes an effort to levy an all-inclusive revenue measure rather than to levy a tax upon merely those possessing the privilege of exercising the electoral franchise.

Were the tax in question levied for the privilege of voting, it is difficult to see just why the legislature should have excepted such a large class of the voters of Tennessee from its operations. Persons more than 50 years of age are not liable for the tax under the statute but vote with impunity in all elections held, without the payment of such tax. Likewise, persons physically incapable of labor may have themselves declared exempted from the levy of this tax, yet such persons when so exempted by proper judicial proceedings may vote to the same extent as though they had paid such tax.

But the factor which to this respondent seems most conclusive as to the soundness of our contentions as to the nature of the tax is to be found in the fact that any person liable for such tax remains liable therefor whether or not such person exercises his or her electoral franchise. Were this a tax upon the privilege of voting, it is inconceivable that liability would be fixed regardless of the exercise of the privilege. Ordinarily, a privilege, license, or excise tax is levied upon the performance of some act, and in the absence of a performance of such particular act, no tax liability accrues.

Then too, this tax is applicable to a vast number of persons who are not qualified voters. Aliens, persons deprived of citizenship, and persons not possessing the residential qualification required for the exercise of the electoral franchise nevertheless are liable for this tax. It seems to this respondent that this fact likewise demonstrates that the tax in question is not a tax on the privilege of voting or on voters as a class.

Then too, in considering whether or not the tax in question is a tax upon a right guaranteed by the Constitution of the United States, it should be noted that there is but one assessment of the tax annually. Such assessment is in a fixed amount. The payment of the tax by the otherwise qualified voter entitles him to participate in *all* elections. There is no requirement that an additional sum be prepaid for the privilege of participating in elections for federal officers. Stated differently, if the otherwise qualified elector pays his poll tax, he may participate in all elections both state and national but conversely, if he fails to pay such poll tax, he may not cast his ballot at any election regardless of its nature.

The proximity of the constitutional and statutory provisions to other taxing statutes frequently affords evidence of the legislative intent. As before stated, the provisions levying this tax are to be found in connection with the revenue laws of this state. The disqualification provisions are found in the section of the statutes dealing with elections. In this connection we call to the attention of the Court the case of *Re Opinion of the Justices*, 11 Pick., 538, wherein passing upon a similar question, the Supreme Court of Massachusetts considered the matter in the following language:

> "But we think the tax act will not justly admit of this construction. It must be considered, that the liability to taxation, and the political privilege of voting, consequent thereon, are established by different acts, at different periods, and having distinct objects in view. Each must be construed by itself. The purpose of the tax act is revenue; it is to lay a burden and charge upon the persons and property of the peo-

ple, to provide funds for public objects. The privilege of voting, consequent thereon, is incidental and collateral, established by a distinct constitutional provision, and is not to be regarded as one of the purposes and designed effects of the act. Such effect, therefore, cannot be much regarded in its construction."

It seems much more plausible to reach the conclusion that the statute in question was enacted as a revenue measure and that the disqualification for failing to pay it was merely incidental and a more effective method of collection. For the first time by the Constitution of 1870 of Tennessee, the amount of this tax was definitely fixed between certain limits. For the first time by the Constitution, its payment was made a prerequisite to voting and likewise, for the first time in that instrument, the cause of education in Tennessee as a state function was definitely undertaken and the proceeds of this tax irrevocably appropriated to that cause. In other words, from these three constitutional provisions, it is our insistence that a scheme for the propagation of education is clearly set forth and that the provisions are but component parts of the same scheme having as its purpose the advancement of public education in Tennessee. By the first part of the plan the tax was levied and fixed at a definite amount considerably in excess of that theretofore levied. By the second part of the plan its collection was to be facilitated by making its prepayment necessary to the exercise of the electoral franchise and by the third part of the plan, all the proceeds thereof were irrevocably dedicated to the cause of education.

In addition thereto, the collection of poll taxes seems to have been a favorite subject of the Tennessee Legislature.

In addition to the above devised method for their collection, we respectfully call to the attention of the Court, Section 1559 of the Code above mention forbidding the collection of ad valorem taxes without the payment of poll tax at the same time.

Now then, when these matters are considered and when the further fact is considered that a statute will not be construed so as to raise serious doubts as to its validity, if another construction be reasonably possible, we respectfully insist that this statute should not be construed as contended for by the appellant. Substantially he asks that this Court give to the statute a construction which might raise grave doubts as to its validity, in the face of canons of construction to the contrary. The statute is perfectly capable of a different construction.

This statute is thoroughly capable of the construction contended for by this respondent. The poll tax in Tennessee was levied prior to the adoption of the provisions providing for disqualification for non-payment thereof. Since this provision for disqualification was added long after the adoption of the poll tax in Tennessee, the presumption seems almost irresistible that where the tax was originally levied for revenue purposes, that continued to be the purpose of the legislature in imposing such taxes and that the provisions for disqualification for non-payment constituted merely an effort upon the part of the legislature to provide for the more effective collection of this tax.

The effectiveness of the scheme adopted by the State of Tennessee may be noted from the following figures issued by the Commissioner of Education of Tennessee, the official in charge of the distribution of school funds. In Ten-

nessee poll taxes for any particular year become delinquent on March 1 of the year following that for which they are assessed. Likewise, to vote, the poll tax of the preceding year must have been paid. Code of Tennessee, Section 2038. Elections in Tennessee, both state and national, are held in the even numbered years. Code of Tennessee, Sections 1919, 1928.

Thus, it may be seen that to vote in an election held in Tennessee during the even numbered years, the poll tax for the odd numbered years must have been paid. The collection of poll taxes in Tennessee for a substantial period antedating the filing of this suit were as follows:

For the Year	*Poll Taxes Collected*
1934	$292,849.02
1935	650,411.31
1936	315,712.58
1937	706,266.60
1938	360,087.83
1939	722,168.98

From the above statistics, it can be seen that the requirement that such tax be prepaid results in the State of Tennessee collecting twice the normal amount from poll taxes for those years for which prepayment thereof is a condition precedent to the exercise of the electoral franchise and demonstrates rather definitely the effectiveness of the method adopted by the legislature.

We, therefore, respectfully insist that under proper rules of construction the statute in question constitutes a revenue measure with merely incidental disqualification for failure to pay such poll tax and that it should not be con-

strued as a statute levying a tax upon the right to vote. But little notice need be taken of the authority cited on behalf of petitioner to the effect that statutes levying poll taxes are intended to levy a tax upon the privilege of voting. That authority is *Ratliff* v. *Beale*, 74 Miss., 247, 20 So., 865. The opinion of the Supreme Court of Mississippi bases its decision upon the prior history of that state and certain facts judicially known to it, none of which are present in the present case, as well as the debates of the constitutional convention of that state authorizing the levy of such tax. More appropriate to the present situation is the language of the Supreme Court of Arkansas in the case of *Whitaker* v. *Watson*, 68 Ark., 555, 60 S. W., 651, 654, as follows:

> "We conceive the object and intent of this provision of the constitution to be not only to induce the citizen to whom the right of suffrage is granted to contribute to the support of the common schools, for which the tax is levied, *but to exclude from voting the citizen who does not take an interest in the welfare of his country or value his vote sufficiently to pay a poll tax.*" (Italics ours.)

IV AND V.

At the beginning of this argument, let it be definitely understood that the respondent does not contend that the right to vote for members of the House of Representatives does not have its origin in the Constitution of the United States and, therefore, does not constitute a federal right. The present case, however, presents a different situation and deals primarily with the right of the state to impose qualifications touching the exercise of such right. It must be remembered that, under existing authorities, it has been held by this Court, upon numerous occasions, that the Con-

stitution of the United States does not guarantee universal suffrage but that on the contrary, the general grant of suffrage emanates from the states. See *Breedlove* v. *Suttles*, 302 U. S., 277; *Guinn* v. *U. S.*, 238 U. S., 362; *Pope* v. *Williams*, 193 U. S., 621; and *Minor* v. *Happersett*, 21 Wall., 162.

When we come to the question of the right to vote for members of the House of Representatives, the constitutional provision involved is Section 2, Article I. This provides as follows:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

From a consideration of the above provision, it may be observed that the Constitution of the United States contains no provision specifically fixing the qualifications of electors for members of Congress but that in lieu thereof, it adopts as such qualifications, those fixed by the state for electors for the most numerous branch of such state legislature.

That this is the correct construction of this constitutional provision appears from the following excerpt from *Ex Parte Yarbrough*, 110 U. S., 651, as follows:

> "*The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress.* Nor can they prescribe the qualifications for voters for those *eo nomine*. *They*

define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend *exclusively* on the law of the state." (Italics ours.)

When the case relied upon by the petitioner (including *U. S.* v. *Classic, et al., supra*), are analyzed, it will be noted that each of them deal with cases where the elector was qualified and there was an attempt to interfere with his exercise of his constitutional right to cast his ballot for members of the House of Representatives, in which case beyond peradventure, he was obstructed in the effort to exercise a federal right. The present case differs radically from such cases. It in effect is an effort to review and revise the action of the state legislature in fixing the qualifications for electors for the most numerous branch of the state legislature merely because such qualifications as are fixed for electors for the most numerous branch of the state legislature automatically become the qualifications of electors for members of the House of Representatives.

Of course, *Breedlove* v. *Suttles, supra,* if followed in the present case, definitely controls its disposition and would require an affirmance of the judgment of the lower court but *Breedlove* v. *Suttles, supra,* is rather severely criticized by counsel for petitioner by virtue of the use of an expression which has been characterized by this Court in a later case as having been used in a loose sense (*U. S.* v. *Classic,*

et al., supra). The expression in question is the statement to the effect that the privilege of voting is not derived from the United States but is conferred by the states. It is true that this expression is not accurate so far as the right to vote for members of the House of Representatives is concerned but is applicable to the general grant of suffrage. *Breedlove* v. *Suttles, supra,* is likewise criticized because the opinion does not mention Article I, Section 2 of the Constitution of the United States. It is true that it does not mention this constitutional provision in so many words but it does cite as one of the cases relied upon, the case of *Ex Parte Yarbrough, supra,* which does cite the particular constitutional provision. The presumption should exist that *Ex Parte Yarbrough, supra,* was not cited in the opinion of the Court in the later case without a careful reading thereof, which careful reading would have called to the attention of the Justice preparing the opinion the particular provision in question.

It is our insistence that from the very nature of things, the requirement that poll tax be prepaid does not constitute a tax upon a federal right. As above stated in a foregoing part of this brief, the party seeking to vote for members of Congress does not attain the status of a federal elector until he shall have met the requirements imposed by the State for electors for members of the most numerous branch of the State Legislature. In Tennessee to so qualify he must be of the age of 21 years, a resident of the State for twelve months next and of the county in which he offers to vote for six months preceding the date of such election and must have paid his poll tax, if legally liable therefor, sixty days prior to the date of such election at which he offers to vote. Until he shall have paid his poll tax, if liable therefor, at least sixty days prior to the date of the election in

question, he does not attain the status of an elector under the state law and is not qualified to vote for members of the most numerous branch of the State Legislature and since he only becomes an elector for members of Congress when he shall possess the qualifications necessary to constitute him an elector for the most numerous house of the State Legislature, it follows naturally that he never attains the status of an elector for members of Congress until he first shall have paid the poll tax assessed against him and shall give to the judges of election due proof of his payment thereof. The tax is not levied upon him after he shall have become an elector for members of Congress. He is subject to no tax by virtue of that status but on the contrary, he is taxed by virtue of the fact that he is an inhabitant of the State of Tennessee and to facilitate collection of the tax and for other purposes, he is required to present evidence of his payment thereof before being permitted to become an elector for the most numerous house of the State Legislature.

VI.

The latest expression of this Court dealing with this question is that of *United States* v. *Classic, et al., supra.* It is our insistence that this opinion clearly recognizes the right of the states to legislate upon the subject of qualifications of the voters, not directly but through the indirect medium of fixing the qualifications for the electors of the most numerous branch of their own legislature and that instead of this case constituting an authority in favor of the petitioner, in reality, it recognizes the principle for which the respondent contends.

From it, we quote the following:

> "Article I, Sec. 2 of the Constitution, commands that 'The House of Representatives shall be composed of members chosen every second year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.' By Sec. 4 of the same article 'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators.' Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is *thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by Sec. 2* and to the authority conferred on Congress by Sec. 4, to regulate the times, places and manner of holding elections for representatives." (Italics ours.)

It will be noticed from the above excerpt that first the right is stated to be guaranteed only to *qualified* voters and secondly, it is to be exercised in conformity to the requirements of state law subject to the restrictions provided by Article I, Sec. 2 of the Constitution of the United States.

Likewise, in this same opinion, we find the following language:

> "Pursuant to the authority given by Sec. 2 of Article I of the Constitution, and subject to the legislative power of Congress under Sec. 4 of Article I, and other pertinent provisions of the Constitution, *the states are*

given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." (Italics ours.)

This excerpt from the opinion clearly recognizes that the states are given an exercise of wide discretion in the power reserved to them by the Constitution of the United States. For instance, prior to the adoption of the Nineteenth Amendment, some states granted to women the privilege of voting, while others denied them this same privilege. Yet, there was no denial of any constitutional right in this respect upon the part of the states declining to grant suffrage to females. Likewise, although the age of 21 years is the customary one at which persons are permitted to vote for the first time, if a state should, in the exercise of its discretion, determine that no person under the age of 35, or any other age that might appeal to the discretion of the legislature, should be permitted to cast a ballot as elector for the most numerous branch of the state legislature, could it be said that such action on the part of the legislative body of the state in question violated any constitutional rights of those who had not attained the required age. Or, should a state through its proper authority determine that a property qualification should be a prerequisite to voting for members of the most numerous branch of its own legislature and refuse to permit those without property so to vote, could it be said that its action violated constitutional rights.

The answer is that since the state has a wide discretion, restrained only by the Constitution of the United States in fixing the qualifications for the most numerous branch of its state legislature, the suggested qualifications could

not be stricken down because no where do they infringe upon the Federal Constitution.

It is suggested in the argument on behalf of petitioner that to require the prepayment of poll tax as a condition precedent for voting savors of a sale of the electoral franchise and that such should be discountenanced by this Court. Likewise, it is said that the prepayment of a tax does not constitute a qualification within the proper meaning of that word as used in the Constitution of the United States.

The respondent is of the opinion that there are two answers to these contentions: first, that the state legislature themselves are the judges of the proper qualifications when they legislate, since they do not legislate directly with reference to the qualifications of electors for members of the House of Representatives, but on the contrary, legislate directly with reference to qualifications of the members of the most numerous branch of the legislature. *Ex Parte Yarbrough, supra.*

Since, therefore, they legislate with reference to matters over which they alone have jurisdiction, their right to fix such qualifications must be tested primarily by their own judgment and discretion.

The second answer to this contention is the admitted fact that at the time of the adoption of the Federal Constitution and its ratification by the original thirteen states, nine of such states required either a property qualification or the payment of taxes as a condition precedent to the exercise of the electoral franchise. These states were Massachusetts, Connecticut, New York, Pennsylvania, New Jer-

sey, Maryland, North Carolina, South Carolina and Georgia.

Minor v. *Happersett, supra.*

Thus, if at the time of the adoption of the Constitution either a property qualification or prepayment of taxes were a condition precedent to the electoral franchise, in the majority of the states ratifying such, it can not be said with any degree of plausibility that the framers of the Constitution did not contemplate that the legislatures of the several states might not require the prepayment of taxes as a qualification for electors for the most numerous branch of its own state legislature.

Finally, from *U. S.* v. *Classic, et al., supra,* we quote the following language:

> "Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its *exercise is prescribed by state action in conformity to the Constitution,* is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex Parte Yarbrough,* 110 U. S., 651; *United States* v. *Mosley,* 238 U. S., 383. And see *Hague* v. *C. I. O.,* 307 U. S., 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase 'rights' 'secured by the Constitution' appearing in Sec. 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see,

Minor v. *Happersett*, 21 Wall., 162, 170; *United States* v. *Reese*, 92 U. S., 214, 217-218; *McPherson* v. *Blacker*, 146 U. S., 1, 38-39; *Breedlove* v. *Suttles*, 302 U. S., 277, 283, *this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Sec. 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Sec. 4* and its more general power under Article I, Sec. 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' See *Ex Parte Siebold*, 100 U. S., 37; *Ex Parte Yarbrough*, *supra*, 663, 664; *Swafford* v. *Templeton*, 185 U. S., 487; *Wiley* v. *Sinkler*, 179 U. S., 58, 64." (Italics ours.)

The underscored language recognizes the right of the states to legislate upon the subject (the qualification of electors) as provided by Section 2 of Article I and thus it is the insistence of the respondent that the latest expression of this Court upon the subject recognizes clearly the right of the state to provide the qualifications it deems requisite for electors for the most numerous branch of its own legislature.

As shown above, the requirement of the prepayment of tax is by no means a recent one. It was in force in a number of the states at the time of the ratification of the Constitution of the United States and if a state desires to make the payment of a tax a qualification, respondent respectfully insists that there is nothing in the Federal Constitution prohibiting such, especially in view of the fact that the states do not fix directly the qualifications of electors for members of the House of Representatives but merely fix

the qualifications for those entitled to vote for the most numerous branch of their own legislature.

VII.

As stated in *Pope* v. *Williams, supra,* the question as to whether the contentions prescribed by the state might be regarded by others as reasonable or unreasonable is not a federal question. A number of cases holding directly or by necessary inference that the requirement of prepayment of tax is reasonable and violates no constitutional right are set forth in the *Points of Law, supra,* and will not be repeated here. Suffice it to say, *Breedlove* v. *Suttles, supra,* decides this question directly in favor of the contention of the respondent despite the efforts of counsel for petitioner to distinguish such from the present case.

VIII.

Finally, we come to the question as to whether or not the requirement of prepayment of a tax constitutes a tax upon a federal right. Perhaps no topic of the law has received more careful consideration in recent years at the hands of this Court than the extent to which states may levy a tax upon federal instrumentalities or federal rights. Originally the slightest matter that savored of a federal right or instrumentality was held exempt from taxation by the states but this doctrine of immunity has been narrowed by appropriate recent decisions of this Court.

The rule by which the validity of a state tax is tested has been variously stated in recent opinions of this Court. In *Educational Films Corp.* v. *Ward,* 282 U. S., 379, 391, we find the following language:

"This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other."

In *Fox Film Company* v. *Doyal*, 286 U. S., 123, 128, we find the rule stated thusly:

"The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat., 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motorcycle Co.* v. *United States*, 283 U. S., 570, 576, 579. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* v. *Maryland*, 254 U. S., 51, 55, 56), *but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of*

government.' Willcuts v. *Bunn,* 282 U. S., 216, 225." (Italics ours.)

Likewise, in *Pacific Company* v. *Johnson,* 285 U. S., 480, 493, we find the following language:

> "Thus, in our dual system of government, action of the one government in the proper exercise of its sovereign powers, regarded as innocuous and permissible notwithstanding its incidental effects on the other, may become offensive and be deemed forbidden if it discriminates against the other. State taxes which, if nondiscriminatory, would be upheld, even though they reach or affect those engaged in interstate commerce, are condemned if they discriminate against those so engaged, by placing on them heavier burdens than those imposed on others within the state."

Finally, in the concurring opinion of Mr. Justice Frankfurter in *Graves* v. *New York,* 306 U. S., 486, 488, we find the rule stated in the following language:

> "But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government."

We think the true rule deducible from the above quoted opinions of this Court is that a tax upon federal instrumentalities or federal rights, to conflict with the doctrine of inter-governmental immunity must be of such a nature as to impede or obstruct the legitimate functions of the government sought to be taxed and that a non-discriminatory tax will not be stricken down by this Court although it may indirectly affect the income from or exercise of a federal right.

In the present case, the provisions under consideration levy no tax against the Federal Government or any instrumentality thereof or right claimed in connection therewith. The Federal Government will not be caused to expend any of its revenues by virtue of these taxing statutes.

When we consider the effect on a person liable for such tax, it will be seen that there is no conscious effort to require him to pay a tax for the exercise of the federal right. He pays a flat non-discriminatory tax of $2.00 per annum. His tax burden is not increased by the exercise of his federal right of suffrage but on the contrary, remains the same whether he exercise such right or not. Surely, it can not be said; therefore, that the tax in question contains any discriminatory features levelled at the Federal Government.

Finally, the tax liability of the person liable for such tax remains the same whether he exercise such federal right or the reverse because, as above stated, his liability for this tax is not abated by his failure to exercise his elective franchise.

If, therefore, the taxes which a state may not lawfully levy are those which obstruct and impede the operation of the Federal Government and its instrumentalities, can it be said with any degree of plausibility that the tax in the

present case falls within that class. No function of the Federal Government is obstructed by the levy of this tax. The tax is not levied directly upon the exercise of any federal right but on the contrary, it is levied directly upon the person liable therefor and the effect upon the Federal Government is so inconsequential and remote as to bring it well within the rule of practical application stressed by this Court in *Educational Films Corp.* v. *Ward, supra,* and reaffirmed in the concurring opinion of Mr. Justice Frankfurter in *Graves* v. *New York, supra.* The tax in question neither cripples nor impedes in the slightest degree the functions of the Federal Government in its sphere of action. Its effect upon the exercise of the constitutional right to vote for members of the House of Representatives is also remote and indirect and, therefore, we respectfully insist that it does not constitute a tax upon a federal right or privilege.

In conclusion, we earnestly insist that the petition for *certiorari* should not be granted by this Court, or in the alternative, if granted, that the judgment of the Circuit Court of Appeals of the Sixth Circuit was correct and should be affirmed.

Respectfully submitted,

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